

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR DEPOSITION

The defendant may not depose the State's expert witness unless the witness is unavailable for trial and/or uncooperative in granting a defense interview. The defense should bear the costs of interviewing the State's expert witness.

The State of Arizona, by and through undersigned counsel, in response to the defendant's Motion for Depositions, requests this Court to deny the motion for the reasons set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The defendant has moved to depose the State's expert witness, Dr. Randall C. Baselt, and has requested that the State be held responsible for any fees assessed for the deposition. Rule 15.3(a) and (c), Arizona Rules of Criminal Procedure provides for court-ordered depositions of witnesses under certain circumstances. That Rule states in relevant part:

- a. Availability. Upon motion of any party or a witness, the court may in its discretion order the examination of any person except the defendant upon oral deposition under the following circumstances:
 - (1) A party shows that the person's testimony is material to the case **and that there is a substantial likelihood that the person will not be available at the time of trial;**
 - (2) A party shows that the person's testimony is material to the case or necessary adequately to prepare a defense or investigate the offense, that he was not a witness at the preliminary hearing, and **that he will not cooperate in granting a personal interview; . . .**
- b. Manner of Taking. Except as otherwise provided herein or by order of the court, depositions shall be taken in the manner provided in civil actions.

[Emphasis added.]

Rule 26(b)(4)(C), Arizona Rules of Civil Procedure, states:

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Dr. Baselt has not been uncooperative in scheduling an interview, nor is he unwilling to be present at trial. The State contends that the real issue in this case is simply which side shall pay the fees incurred for the pretrial interview. It has been the State's policy since 1993 that the costs and/or fees for pretrial interviews and depositions of expert witnesses shall be paid by the party who requests the interview or depositions. The Rules are clear that the time spent interviewing or deposing an expert witness is to be borne by the requesting party. Nevertheless, the time spent by the expert witness in preparation for the interview or deposition will be paid by the party who has listed the expert for use at trial, regardless of which party requests discovery. This comports with the comments to Civil Rule 26(b)(4), which indicates that this time would be required in any case for the expert's appearance at trial. [See attachment.]

CONCLUSION

As the witness is not uncooperative and will be present at trial, the State requests this Court to deny the Defendant's Motion for Deposition. The State further requests that the witness interview with Dr. Baselt be scheduled during regular working hours, 8:00 a.m. and 6:00 p.m., Monday through Friday, at a location convenient for Dr. Baselt. The

State also requests that the defendant be ordered to bear the costs of the interview pursuant to the Arizona Civil and Criminal Rules of Procedure.